Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02–43 OF 2008(W) AND 02–42 OF 2008(W)
ZAKI AZMI CHIEF JUSTICE, ARIFIN ZAKARIA CJ (MALAYA) AND AUGUSTINE PAUL FCJ
18 JUNE 2009

Civil Procedure — Service — Writ of summons — Writ filed but no effort made to serve during validity — Non-compliance with requirements in O 6 r 7(2A) of the Rules of the High Court 1980 — Whether extension of writ may be granted

Civil Procedure — Writ of summons — Extensions of — Extensions granted twice for non-service — Appeal against — Prerequisites to exercise of discretion under O 6 r 7(2) of the Rules of the High Court 1980 — Whether requirements of O 6 r 7(2A) mandatory — Whether orders for extension of writ defective — Whether defect curable under O 1A

The respondent filed a writ of summons at the Singapore High Court ('the Singapore writ') and simultaneously filed two other writs containing almost identical pleadings and cause of action at the High Courts at Shah Alam ('the Shah Alam writ') and Kuala Lumpur ('the Kuala Lumpur writ'). The Singapore writ was served on the appellant while the Shah Alam and Kuala Lumpur writs were not served. During case management in the Singapore action, these two other Malaysian actions were disclosed and hence the senior assistant registrar ('SAR') directed the respondent to withdraw the Singapore writ and to serve the Shah Alam writ within six weeks. The Singapore Court of Appeal dismissed the respondent's appeal and the stay order by the Singapore SAR was affirmed. By then, about 16 months had lapsed from the filing of the Shah Alam action. Meanwhile, the respondent had sought and obtained two ex parte orders from the High Court at Shah Alam to renew the validity of the writ. The Kuala Lumpur writ was also extended by way of two ex parte orders. Both the writs had been renewed ex parte without any attempt having been made to serve them on the appellant. The two appeals here were in relation to these ex parte extension orders. The following questions arose for the determination of the Federal Court: (i) whether the requirement of showing such efforts that have been made to effect service of a writ under O 6 r 7(2A) of the Rules of the High Court 1980 ('RHC') is

a mandatory prerequisite to the exercise of discretion under O 6 r 7(2) of the RHC; and (ii) in the event of such a failure to comply with the prerequisites of O 6 r 7(2A), whether O 1A can be invoked in order to cure that failure.

Held, allowing the appeals with costs:

(1) There are three prerequisites under O 6 r 7(2A) of the RHC which an applicant for renewal of a writ must prove. The application must: (i) be made before the expiry of the writ; (ii) be made ex parte by summons; and (iii) be supported by an affidavit identifying two salient points which are: that efforts have been made to serve the defendant within one month of the date of the issue of the writ; and such efforts have been made subsequent thereto to effect service (see para 15).

(2) Before the court could exercise its discretion to renew a writ, O 6 r 7(2A) of the RHC must be satisfied. The applicant must use all due diligence to effect service at the earliest possible time. Courts should examine closely the affidavits filed in support of applications for extensions. Before granting an extension, courts must be satisfied that serious efforts had been made to serve. A simple and plain statement that efforts had been made to serve cannot be a sufficient ground. The affidavits must provide detailed facts as to when, where and how attempts to serve were made (see paras 36 & 40).

(3) The first question was answered in the positive. The requirements of O 6 r 7(2A) are mandatory prerequisites. The respondent's applications for extension of time for service of the writs were defective as they did not show compliance with the RHC (see para 43).

(4) Order 1A of the RHC must not supersede a mandatory requirement of the RHC. Order 1A cannot be invoked when a party intentionally disregards in complying with the RHC. Thus in this case, O 1A of the RHC did not apply as the respondents had intentionally disregarded O 6 r 7(2A) for their own reasons. Order 6 r 7(2A) of the RHC which deals with the service of a writ is mandatory. Order 1A of the RHC cannot be invoked to cure the failure to comply with the prerequisites of O 6 r 7(2A). Therefore, the answer to question two was in the negative (see paras 46 & 50).

[Bahasa Malaysia summary

Responden telah memfailkan writ saman di Mahkamah Tinggi Singapura ('writ Singapura') dan dengan serentak memfailkan dua lagi writ yang mengandungi pliding yang hampir sama dan kausa tindakan di Mahkamah Tinggi di Shah Alam ('writ Shah Alam') dan Kuala Lumpur ('writ Kuala

A Lumpur'). Writ Singapura disampaikan kepada perayu manakala writ-writ Shah Alam dan Kuala Lumpur tidak disampaikan. Semasa pengurusan kes dalam tindakan Singapura, dua lagi tindakan di Malaysia didedahkan dan oleh sebab itu, penolong kanan pendaftar ('PKP') telah mengarahkan responden untuk menarik balik writ Singapura dan menyampaikan writ Shah B Alam dalam tempoh enam minggu. Mahkamah Rayuan Singapura menolak rayuan responden dan arahan penggantungan oleh PKP Singapura telah disahkan. Pada waktu itu, 16 bulan telah berlalu daripada tindakan Shah Alam difailkan. Sementara itu, responden telah menuntut dan mendapatkan C dua arahan ex parte daripada Mahkamah Tinggi di Shah Alam untuk memperbaharui keesahan writ itu. Writ Kuala Lumpur juga telah dilanjutkan melalui dua arahan ex parte itu. Kedua-dua writ itu telah diperbaharui secara ex parte tanpa sebarang percubaan untuk menyampaikannya kepada perayu. Kedua-dua rayuan di sini berkaitan dengan arahan perlanjutan ex parte D tersebut. Soalan-soalan berikut dikemukakan untuk ditentukan oleh Mahkamah Persekutuan: (i) sama ada keperluan untuk menunjukkan bahawa usaha telah dibuat untuk menyampaikan writ di bawah A 6 k 7(2A) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') adalah prasyarat mandatori untuk menggunakan budi bicara di bawah A 6 k 7(2) KMT; dan E (ii) sekiranya berlaku kegagalan untuk mematuhi prasyarat A 6 k 7(2A), sama ada A 1A boleh digunakan untuk mengatasi kegagalan itu.

F **Diputuskan**, membenarkan rayuan dengan kos:

(1) Terdapat tiga prasyarat di bawah A 6 k 7(2A) KMT yang perlu dibuktikan oleh pemohon untuk memperbaharui writ. Permohonan itu mesti: (i) dibuat sebelum writ itu habis tempoh; (ii) dibuat melalui G saman ex parte; dan (iii) disokong oleh satu afidavit yang mengenalpasti dua perkara penting iaitu: bahawa usaha-usaha untuk menyampaikan kepada defendan telah dibuat dalam masa sebulan dari tarikh writ itu dikeluarkan; dan usaha-usaha itu dibuat bagi tujuan penyampaian (lihat perenggan 15).

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(2) Sebelum mahkamah menggunakan pertimbangan untuk memperbaharui writ, A 6 k 7(2A) KMT perlu dipenuhi. Pemohon mesti cuba menyampaikan dengan usaha sewajarnya pada waktu yang terawal. Mahkamah mesti memeriksa secara teliti afidavit-afidavit yang I telah difailkan sebagai sokongan terhadap permohonan-permohonan untuk perlanjutan. Sebelum memberikan perlanjutan, mahkamah mesti berpuas hati bahawa usaha yang serius telah dibuat untuk penyampaian. Kenyataan yang ringkas dan mudah bahawa usaha-usaha telah dibuat untuk penyampaian bukanlah alasan yang mencukupi.

Afidavit-afidavit mesti menyediakan fakta-fakta terperinci mengenai bila, di mana dan bagaimana cubaan-cubaan untuk penyampaian dibuat (lihat perenggan 36 & 40).

(3) Soalan pertama dijawab secara positif. Keperluan A 6 k 7(2A) adalah prasyarat mandatori. Permohonan-permohonan responden untuk melanjutkan masa untuk menyampaikan writ-writ itu cacat memandangkan permohonan itu tidak mematuhi KMT (lihat perenggan 43).

(4) Aturan 1A KMT mestilah tidak melebihi keperluan mandatori KMT. Aturan 1A tidak boleh digunakan apabila satu pihak secara sengaja tidak mengendahkan daripada mematuhi KMT. Oleh itu dalam kes ini, A 1A KMT tidak terpakai memandangkan responden dengan sengaja tidak mengendahkan A 6 k 7(2A) KMT atas sebab-sebab mereka yang tersendiri. Aturan 6 k 7(2A) KMT yang berkaitan dengan penyampaian writ adalah mandatori. Aturan 1A KMT tidak boleh digunakan untuk mengatasi kegagalan untuk mematuhi prasyarat A 6 k 7(2A) KMT. Oleh yang demikian, jawapan bagi soalan kedua ialah negatif (lihat perenggan 46 & 50).]

Notes

For cases on extension of writ of summons, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 8026–8029.

For cases on writ of summons, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6313–6320.

Cases referred to

Battersby & Ors v Anglo-American Oil Company Ltd & Ors [1944] 2 All ER 387, CA (folld)

Gangadhar Dandawate v Premechand Kashyap AIR 1958 MP 182 (refd)

Heaven v Road and Rail Wagon Ltd [1965] 2 All ER 409, QBD (refd)

Llyod Triestino Societa v Chocolate Products (M) Sdn Bhd [1978] 2 MLJ 27, FC (refd)

Mayban Finance Bhd v Umas Sdn Bhd & Anor [2002] 4 MLJ 276, HC (folld)

Mayhew v The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon [1991] 2 EGLR 89 (refd)

Shell Chemicals UK Ltd & Another v Vinamul Ltd (formerly Vinyl Products Ltd) The Times 7 March; 1991 135 SJ 412 (Transcript Association) (refd)

Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd [1996] 2 MLJ 678, HC (refd)

Vinos v Marks & Spencer plc [2001] 3 All ER 784, CA (folld)

Legislation referred to

Civil Procedure Rules [UK] rr 3.10, (a), 7.5, 7.6(3)

Rules of the High Court 1980 O 1A, O 6 r 7(1), (2), (2A)

A Rules of the Supreme Court 1957 O 8 r 1
Rules of the Supreme Court 1957 [UK] O 8 r 1
Rules of the Supreme Court 1964 [UK] O 6 r 8(2)

Malik Imtiaz Sarwar (Muhammad Shafee Abdullah, Mathew Thomas Philip
B *and Asma Mohd Yunus with him) (Thomas Philip) for the appellant in Appeal No 02–42 of 2008.*
Jeffery Wong (Jeffery Wong, Noorul, Ho and Lim with him) for the respondent in Appeal No 02–42 of 2008.
Muhammad Shafee Abdullah (Malik Imtiaz Sarwar, Mathew Thomas Philip
C *and Asma Mohd Yunus with him) (Thomas Philip) for the appellant in Appeal No 02–43 of 2008.*
RR Sethu (Jeffery Wong with him) (RR Sethu) for the respondent in Appeal No 02–43 of 2008.

D **Zaki Azmi Chief Justice:**

INTRODUCTION

E **[1]** These appeals concern the interpretation and application of O 6 rr 7(2)and 7(2A) of the Rules of the High Court 1980 ('RHC'). Related to that is the manner in which O 1A of the RHC is to be applied.

[2] The two appeals before us relating to the said issues are Civil Appeal No
F 02–42 of 2008 (W) (hereinafter referred to as Appeal A) and Civil Appeal No 02–43 of 2008 (W) (hereinafter referred to as Appeal B). The parties rely on submissions and bundle of authorities submitted in regard to Appeal A. The issues in both appeals arose because both writs from which the appeals originated were extended even though no attempts were made to serve either
G of them on the appellant. The validity and effect of these renewals are what is ought to be impugned.

[3] The following question was therefore posed to us:

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> Whether the requirement of showing such efforts that have been made to effect service of a writ under O 6 r 7(2A) of the RHC is a mandatory prerequisite to the exercise of discretion under O 6 r 7(2) of the RHC.

I **[4]** During the course of the hearing, we allowed a consequential question to be posed and it is as follows:

> In the event of such a failure to comply with the prerequisites of O 6 r 7(2A), whether O 1A can be invoked in order to cure that failure.

FACTS

[5] The facts are as follows.

[6] The respondent filed a writ of summons at the Singapore High Court ('the Singapore writ/action') on 29 September 2000. Simultaneously with that, on the same date, the respondent also filed another writ containing almost identical pleadings and cause of action at the High Court at Shah Alam ('the Shah Alam writ/action'). A third writ was filed not much later ie on 13 July 2001 at the High Court in Kuala Lumpur (the Kuala Lumpur writ/action), again, containing similar pleadings and cause of action. The Singapore writ was served on the appellant on 22 February 2001. On the other hand, the Shah Alam and the Kuala Lumpur writs were kept away from the knowledge of the appellant. The appellant was totally unaware of these two other actions.

[7] The Singapore action proceeded with the hearing before the High Court judge who referred it to his senior assistant registrar ('SAR') for case management. It was only before the SAR that the respondent, in answer to a query raised by the SAR, disclosed that the respondent had filed two other actions in Malaysia. The Singapore SAR directed the respondent to withdraw the Singapore writ and to serve the Shah Alam writ within six weeks of that direction which was made on 15 May 2001.

[8] The respondent had, of course without the knowledge of the appellant, sought and obtained orders from the SAR of the High Court at Shah Alam to renew the validity of the writs of summons before their expiry. The SAR of the High Court at Shah Alam granted a renewal of the Shah Alam writ pursuant to the application filed on 20 March 2001. Subsequently, pursuant to another application filed on 4 September 2001, a second extension was granted on 6 December 2001. In other words, two extensions were obtained ex parte.

[9] In the meanwhile, the respondent appealed to the judge in chambers (in Singapore) against the SAR's orders and subsequently to the Singapore Court of Appeal. The Singapore High Court as well as the Singapore Court of Appeal dismissed the appeal and the stay order by the Singapore SAR was affirmed. The decision of the Singapore Court of Appeal was made on 19 February 2002. It must be noted that by the time this order was made, about 16 months had lapsed from the filing of the Shah Alam action.

[10] The Shah Alam writ was only served on the appellant's solicitors on 27 March 2002, although the solicitors had undertaken to accept service of the writ immediately after the Singapore Court of Appeal had ordered service

of the writ on the appellant on 15 May 2001. According to the appellant's solicitors, the respondent's solicitors had informed them that they did not have instructions to serve the Shah Alam writ. The respondent's Singapore solicitors had also replied that there was no necessity to serve the Malaysian writ on the appellant as yet. This was notwithstanding the appellant's Singapore solicitors having given notice that failure to serve the Malaysian High Court writ would prejudice the appellant.

[11] As regards the writ in the High Court at Kuala Lumpur, it was filed on 13 July 2001. Naturally, the writ expired on 12 February 2002. Two applications to extend the writ were made on 24 January 2002 and 26 June 2002. The orders for extension were made on 26 March 2002 and 26 July 2002 respectively. It must be noted that the first extension was only applied for after the expiry of the Kuala Lumpur writ.

[12] I cite these facts in some detail to show the machiavellian attitude of the respondent. For the purpose of this case, what is important is that the Shah Alam and the Kuala Lumpur writs had been renewed ex parte without any attempt having been made to serve them on the appellant. This is not in dispute. In fact, the affidavit in support of the applications for renewals had clearly stated that the writs of summons were not served pending the outcome of the Singapore action. The respondent referred to these writs as 'protective writs' in order to avoid the limitation period from setting in.

[13] I will now consider the two questions posed.

QUESTION NO 1

Whether the requirement of showing such efforts that have been made to effect service of a writ under O 6 r 7(2A) of the RHC is a mandatory prerequisite to the exercise of discretion under O 6 r 7(2) of the RHC.

O 6 r 7(1), (2) and (2A) of the RHC

[14] Now, let us look at the law on the effect of not complying with the requirements of O 6 r 7(1), (2) and (2A) of the RHC. These rules read as follows:

O 6: Writs of Summons: General Provisions

r 7: Duration and renewal of writ (O 6 r 7)

(1) For the purpose of service, a writ (other than a concurrent writ) *is valid in the first instance for 6 months*, beginning with the date of its issue and

a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.

(2) *Subject to paragraph (2A), where efforts to serve a writ on a defendant have been unsuccessful*, the Court may by order extend the validity of the writ twice (in Sabah and Sarawak thrice and in admiralty actions 5 times), not exceeding 6 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order.

(2A) An application for renewal *must be made before the expiry of the writ*, ex parte by summons, *supported by affidavit showing that efforts have been made to serve the defendant within one month of the date of the issue of the writ and that efforts have been made subsequent thereto to effect service*.

(Emphasis added.)

[15] A writ issued in the first instance is valid for only six months. Thereafter, r 7(2) of the RHC confers a discretionary power on the court to extend the validity of the writ and such discretion is to be exercised subject to r 7(2A) of the RHC. There are three prerequisites under r 7(2A) of the RHC which an applicant for renewal of a writ must prove. They are that it must:

(a) be made before the expiry of the writ;

(b) be made ex parte by summons;

(c) be supported by an affidavit identifying two salient points which are:

(i) that efforts have been made to serve the defendant within one month of the date of the issue of the writ; and

(ii) such efforts have been made subsequent thereto to effect service.

[16] The majority judgment of the Court of Appeal held that the wording of O 6 r 7(2) and (2A) of the RHC do not detract from the court in exercising its inherent jurisdiction to grant an extension of time if there is a good reason for non-service as the rules are to be interpreted to ensure justice. The majority ruled that the words 'must be made before the expiry of the writ, ex parte by summons, supported by affidavit showing that efforts have been made to serve the defendant within one month of the date of the issue of the writ and that efforts have been made subsequent thereto to effect service' in r 7(2A) were surplusage. In so doing, it relied on the decision of Megaw J in *Heaven v Road and Rail Wagon Ltd* [1965] 2 All ER 409. In that case, Megaw J dealt with the pre 1964 Rules of the Supreme Court ('RSC')

A O 8 r 1 and the post 1964 RSC O 6 r 8(2) of England. The earlier RSC contained the words 'if satisfied that reasonable effort has been made to serve such defendant, or for other good reasons'. In the new RSC, the underlined words were removed from the provision. Megaw J read back into the new RSC O 6 r 8(2) the words 'or for other good reasons'. He said:

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> I think that the omission was probably because the words omitted added nothing and subtracted nothing. They were surplusage.

C **[17]** The learned Court of Appeal judges in the majority judgment said:

> To allude to the words of Megaw J, the words, 'if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons before an application of extension is filed', are a surplusage. By that same token and reasoning, the need to show efforts having been made to serve the writ on the
> D defendant (the appellant here) in O 6 r 7(2A) when read together with O 1A of the RHC, must be surplusage.

[18] They concluded that filing the two writs (the Shah Alam writ and the
E Kuala Lumpur writ) as 'protective writs' is a good reason for extension of the writ even though there were no attempts of serving the writs.

[19] I do not agree with such a conclusion. The writ could have been served and a stay sought pending disposal of the Singapore writ. But, that is only one
F of the reasons why I do not agree with the conclusion of the majority judgment at the Court of Appeal.

[20] I would rather follow the conclusions of the English Court of Appeal in *Battersby & Ors v Anglo-American Oil Company Ltd & Ors* [1944] 2 All ER
G 387 at p 391 as well as in *Vinos v Marks & Spencer plc* [2001] 3 All ER 784.

[21] In *Battersby & Ors v Anglo-American Oil Company Ltd & Ors* [1944] 2 All ER 387, Lord Goddard held that the issue of a writ becomes a nullity by reason of non-service within the prescribed time. At p 389F, he said:

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> If the writ had ceased to be in force, the position is the same as if it had never been issued.

I **[22]** I therefore agree with the views of Skinner J in *Mayban Finance Bhd v Umas Sdn Bhd & Anor* [2002] 4 MLJ 276 (see pp 287–288) in following *Battersby & Ors v Anglo-American Oil Co Ltd & Ors* [1945] 1 KB 23 at p 32, where he cited what Lord Goddard had to say on the matter of the renewal of a writ:

> We conclude by saying that, even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction given by the rule ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on an application which is necessarily made ex parte. In every case, care should be taken to see that the renewal will not prejudice any right of defence then existing, *and in any case, it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as indeed, is laid down in the order*.

Note that these views were based on the provisions existing then.

[23] In the subsequent decision of the Court of Appeal in *Vinos v Marks & Spencer plc* [2001] 3 All ER 784, May LJ, in discussing the new Civil Procedure Rules ('CPR') r 7.5 (provides that subject to exception, a claim form must be served within four months after the date of issue) and r 7.6(3) (Rule 7.6: Extension of time for serving a claim form — rule 7.6(3): 'If a claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by any an order made under this rule, the Court may make such an order *only if* — (a) the Court has failed to serve the claim form; or (b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and (c) in neither case, the claimant has acted promptly in making the application) (a two member panel, the other being Peter Gibson LJ) said:

> The meaning of r 7.6(3) is plain. *The court has power to extend the time for serving the claim form after the period for its service has run out only if the stipulated conditions are fulfilled. That means that the court does not have power to do so otherwise*. The discretionary power in the rules to extend time periods — r 3.1(2)(a) (Rule 3.1: The Court's General Powers of Management — r 3.1(2): Except where these rules provide otherwise, the court may — (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)) does not apply because of the introductory words. The general words of r 3.10 (ibid, para 37) cannot extend to enable the court to do what r 7.6(3) specifically forbids, nor to extend time when the specific provision of the rules which enables extensions of time specifically does not extend to making this extension of time.
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> ...
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> Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored. It would be erroneous to say that, because Mr Vinos' case is a deserving case, the rules must be interpreted to accommodate his particular case.
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> ...

A Rule 3.10 (Ibid, para 37) concerns correcting errors which parties have made, but it does not by itself contribute to the interpretation of other explicit rules. If you then look up from the wording of the rules and at a broader horizon, one of the main aims of the CPR and their overriding objective is that civil litigation should be undertaken and pursued with proper expedition.

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If you do, it is my judgment generally in accordance with the overriding objective that you should be required to progress the proceedings speedily and within time limits.

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[24] Peter Gibson LJ had this to say:

The construction of the CPR, like the construction of any legislation, primary or delegated, requires the application of ordinary canons of construction, though the CPR, unlike their predecessors, spell out in Pt 1 the overriding objective of the new procedural code. The court must seek to give effect to that objective when it exercises any power given to it by the rules or interprets any rule. But the use on r 1.1(2) (Rule 1.1: The overriding objective — r 1.1(2): Dealing with a case justly includes, so far as is practicable — (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate — (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each part; (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases) of the word 'seek' acknowledges that the court can only do what is possible. The language of rule to be interpreted may be so clear and jussive that the court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case, though in that context it should not be forgotten that the principal mischiefs which the CPR were intended to counter were excessive costs and delays justice to the defendant and to the interests of other litigants may require that a claimant who ignores time limits prescribed by the rules forfeits the right to have his claim tried.

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[25] Both judges in *Vinos v Marks & Spencer plc* held that unless the condition set out in r 7.6(3) had been complied with, the court has no discretion to extend the validity of the claim. Rule 7.6(3) of the English CPR uses the words 'only if', whilst our O 6 r 7(2) and (2A) uses the word 'must'.

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[26] Historically, the relevant provisions of our Rules of the High Court and the English Rules of the Supreme Court were identical. Let us examine them.

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[27] In order to understand the rationale behind the wording of O 6 r 7(2) and (2A), it will be useful to look at the same rule prior to the amendment introduced in 2000. It was O 8 r 1 of the then Rules of the Supreme Court

1957. This rule is the predecessor of the present O 6 r 7 and it expressly provides for certain prerequisites to be satisfied before a writ can be renewed. It is that the court must be 'satisfied that reasonable efforts had been made to serve such dependant, or for other good reasons'.

[28] In 1980, the Rules of the Supreme Court was renamed as the Rules of the High Court 1980 and O 8 r 1 was numbered as O 6 r 7(2). This rule did not state the prerequisites that must be satisfied before a writ could be renewed. This O 6 r 7(2) would appear to give a totally wide discretion to the court in the renewal of a writ.

[29] These two provisions were correspondingly identical to the English 1957 RSC and the 1964 RSC. It is in respect of these two provisions that Megaw J held in *Heaven v Road and Rail Wagon Ltd* that the words *'for good reasons'* must be read back into the 1964 RSC although those words had been omitted. This is a sensible interpretation as the court cannot be obliged to renew a writ automatically without any good reason. As was said by Lord Goddard, care should be taken to ensure that the renewal will not prejudice any right of defence that may be available to the defendant. Clearly, the withholding of proceedings while some other case is being tried or to await the result of a future development cannot constitute a good reason.

[30] Our Rules Committee took into consideration the abuse of filing a writ by a plaintiff and not doing anything about it. Hence, a new and improved O 6 r 7 was introduced. This is consistent with the new CPR in England.

[31] In my opinion the object of the new O 6 r 7 was to make it really tight as to when a writ can be renewed. The word 'must' appearing in O 6 r 7(2A) is not usually used in Malaysian legislations. Normally the word used is 'shall'. So in this case, when the word 'must' is used, the intention is to fully ensure that it is complied with and no discretion is to be given as far as the compliance with the prerequisites is concerned. 'Must' is a very strong word; in my opinion it is stronger than the word 'shall'.

[32] In *Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678, Abdul Kadir Sulaiman J (as he then was) considered the word 'must' in the context of O 32 r 13(2) which states, inter alia:

> (2) Save as otherwise provided in these rules —
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> An affidavit intended to be used in support of an application *must* be filed and served on the other party within 14 days from the date of the filing of the application …

[33] In his judgment he stated:

> O 32 r 13(2)(a) use an imperative word 'must'. In its ordinary meaning it is a word of absolute obligation. Therefore for the failure of the plaintiff to have the affidavit in support served upon the defendant within the time limit allowed by the rule, I would agree with the submission of learned counsel for the defendant that it renders the said affidavit inadmissible. Order 2 r 1 of the RHC would not be of any help to the plaintiff as no reason was put forward by the plaintiff for the delay in the service of the said affidavit.

[34] See also *Shell Chemicals UK Ltd & Another v Vinamul Ltd (formerly Vinyl Products Ltd)* The Times 7 March; 1991 135 SJ 412 (Transcript Association); *Mayhew v The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon* [1991] 2 EGLR 89; *Battersby & Ors v Anglo-American Oil Company Ltd & Ors* [1944] 2 All ER 387 was followed by Chan Min Tat FJ in *Llyod Triestino Societa v Chocolate Products (M) Sdn Bhd* [1978] 2 MLJ 27.

[35] Even if the word 'must' is to be construed as having the same effect as 'shall', nevertheless it still make compliance with the prerequisites mandatory.

[36] The words 'Subject to para (2A)' in the impugned O 6 r 7(2) further strengthens the argument that before the court could exercise its discretion to renew a writ, para (2A) must be satisfied. It must be further noted that in para (2A) the applicant must show, inter alia, that efforts had been made to serve the defendant within one month of the date of the issue of the writ. This all the more supports the argument that the applicant must use all due diligence to effect service at the earliest possible time.

[37] The argument by the claimant in *Vinos v Marks & Spencer plc* was that the court had power to grant an extension of time to serve the writ under CPR r 3.10(a). CPR r 3.10(a) reads as follows:

> r 3.10 General power of the court to rectify matters where there has been an error of procedure
>
> Where there has been an error of procedure such as a failure to comply with a rule or practice direction — (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error.

[38] CPR r 3.10(a) which provides that where there had been an error of procedure, such as failure to comply with the rules, the court could make an order to remedy the error. It was contended that CPR r 3.10 contained a

general power to rectify matters where there had been an error of procedure. CPR r 3.10(a) seems to be similar to our O 1A of the RHC, which will be discussed later.

[39] I strongly believe that O 6 r 7(2A) of the RHC was introduced to prevent abuse by the plaintiffs in filing writs and sleeping on them without making efforts to serve them. This practice of inactivity is something which courts loathe. It is against the administration of justice. It creates a backlog and results in a false number of pending cases. In my opinion, courts should take serious a view of such cases. If not, they will continue to remain in the list of outstanding cases. As such, O 6 r 7(2A) of the RHC must be strictly enforced as required by the rule.

[40] When the plaintiffs apply to extend the validity of writs, courts should examine closely the affidavits filed in support of applications for extensions. Before granting an extension, courts must be satisfied that serious efforts had been made to serve. A simple and plain statement that efforts had been made to serve cannot be a sufficient ground. The affidavits must provide detailed facts as to when, where and how attempts to serve were made. Otherwise O 6 r 7(2A) of the RHC will become a dead letter. The object of the rule will be defeated.

[41] By serving the writ at the earliest possible time, the defendant would be given the earliest possible notice and opportunity to prepare his defence. It would be to his disadvantage if there is delay. Such delay may result in evidence in his favour getting misplaced or destroyed. Witnesses become difficult to trace and memories will lapse.

[42] Having said that, I am fully aware of the defendant who avoid service. There must be evidence to support this claim. If serious efforts are made, I am sure defendant is traceable. In appropriate cases, substituted service may be ordered if they are not traceable.

[43] Accordingly, I have no hesitation in answering the first question posed in the positive, that is to say, the requirements of O 6 r 7(2A) are mandatory prerequisites. This means that the applications for extension of time for service of the writs made by the respondents are defective as they do not show compliance with the RHC.

QUESTION NO 2

In the event of such a failure to comply with the prerequisites of O 6 r 7(2A), whether O 1A can be invoked in order to cure that failure

A [44] Now to O 1A of the RHC. This order relates to the administering of Rules of the High Court 1980. In order to invoke O 1A, parties must apply the object of the Rules first. Order 1A reads as follows:

O 1A Court or Judge shall have regard to justice

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> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

C [45] That order came into force on 17 May 2002 vide PU (A) 197/2002, well after the first renewal of both the Shah Alam and Kuala Lumpur writs.

[46] The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision D such as O 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. Order 1A cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to E ignore the Rules. Thus in this case, O 1A of the RHC does not apply as the respondents had intentionally disregarded O 6 r 7(2A) for their own reasons.

[47] It is now necessary to determine the meaning of the phrase '… technical non-compliance ...' in O 1A of the RHC as it will assist in F identifying the breaches contemplated by the rule. Useful guidance is provided by the meaning of the phrase 'technical defect' considered in *Gangadhar Dandawate v Premechand Kashyap* AIR 1958 MP 182 where AH Khan J said at p 184:

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> It is not always easy to define what the expression 'technical defect' means. A technical defect in law is one which may come within the four corners of it, but it does not affect the merits of the case. It is a mistake which does not go to the core of the matter. Their Lordships of the Supreme Court in *Pratap Singh v Shrikrishna Gupta* AIR 1956 SC 140 (C), have observed:

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> that the tendency of the courts towards technicality is to be deprecated, that it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter: they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as whole and provided no prejudice I ensues; and when the legislature does not itself state which is which, judges must determine the matter, and, exercising a nice discrimination, sort out one class from the other along broad based, common sense lines. This principle was enunciated by Viscount Maugham in *Punjab Co-operative Bank Ltd, Amritsar v Income-tax Officer, Lahore* AIR 1940 PC 230 (D).

[48] In the context of the Rules of the High Court 1980 the phrase '… technical non-compliance ...' is thus a reference to non-compliance with a rule which is not fundamental or mandatory in nature.

[49] The *Malaysian Court Practice 2007* Desk Edition lists at p 9, a failure to renew a writ for service as a breach of a fundamental kind. The answer to the first question also shows that O 6 r 7(2A) of the RHC which deals with the service of a writ is mandatory. It follows that O 1A of the RHC cannot be invoked to cure the failure to comply with the prerequisites O 6 r 7(2A) of the RHC.

[50] As I had mentioned in court, if O 1A is sought to be invoked whenever a party fails to comply with any provision of the rules, then the whole of the Rules of the High Court 1980 would be rendered useless. For example, can failure to enter appearance or file defence within the specified period be considered as an irregularity? Of course it cannot be. A party who is late in filing the relevant papers must obtain an order from the court to extend the time, if such extension is required and is permitted by the RHC. Therefore, the answer to question two is in the negative.

[51] On the issue of conditional appearance, I am satisfied that the appellant has not submitted himself to the jurisdiction of the court or waived his right to conditional appearance merely because he had filed the application to strike out the writ and had applied to have his case transferred to the High Court at Johor Bharu. This the appellant did in accordance with the terms allowed by the court when he sought and obtained the order to enter conditional appearance. I need not say more on this issue.

[52] These appeals are thus allowed with costs. Deposit to be refunded to the appellant.

[53] My learned brothers Arifin Zakaria CJM and Augustine Paul FCJ have seen this judgment in draft. I have incorporated their comments for which I am grateful. They have expressed their concurrences to the final draft.

Appeals allowed with costs.

Reported by Kanesh Sundrum